

No. 1332

(10)

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MAY 29 1945

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**Supreme Court of the United States**

OCTOBER TERM 1944

SAMUEL GREENBERG,

Petitioner,

*against*

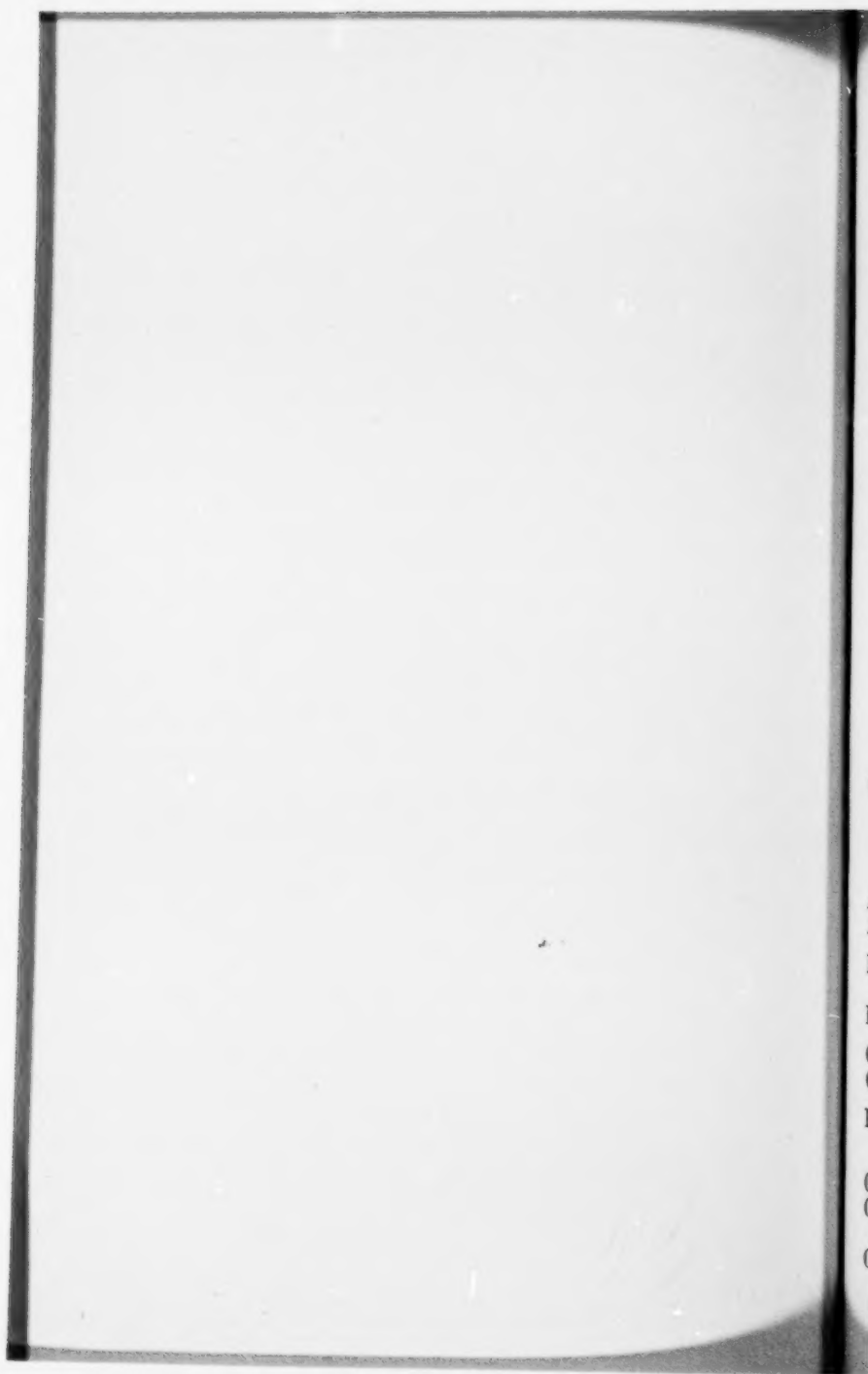
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
APPELLATE DIVISION OF THE SUPREME COURT  
OF THE STATE OF NEW YORK AND BRIEF IN  
SUPPORT THEREOF.

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of Counsel.



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# Supreme Court of the United States

OCTOBER TERM 1944

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SAMUEL GREENBERG,

Petitioner,

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

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## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Samuel Greenberg prays for a Writ of Certiorari directed to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, directing it to send the record and proceedings in this cause to the Supreme Court of the United States for review and determination.

### Summary Statement of the Matter Involved

On February 8th, 1944 the Grand Jury of New York County found an indictment against the petitioner for violation of subdivision 4 of Section 376 of Article 16 of the Tax Law of the State of New York. Said subdivision reads as follows:

“Any individual, corporation or partnership, or any officer or employee of any corporation, or member or

employee of any partnership, who, with intent to evade any tax or any requirement of this article or any lawful requirement of the tax commission thereunder, shall fail to pay the tax, or to make, render, sign or verify any return, or to supply any information, within the time required by or under the provisions of this article, or who, with like intent, shall make, render, sign or verify any false or fraudulent return or statement, or shall supply any false or fraudulent information, shall be liable to a penalty of not more than one thousand dollars, to be recovered by the attorney-general, in the name of the people, by action in any court of competent jurisdiction, and shall also be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court."

The indictment contains two counts: In the first count it is alleged that the petitioner in the County of New York "unlawfully, wilfully and knowingly did make, render, sign and certify a false and fraudulent income tax return and statement" for the taxable year 1941 (R., p. 5) and in the second count it is alleged that the petitioner in the County of New York "unlawfully, wilfully and knowingly did make, render, sign and certify a false and fraudulent income tax return and statement" for the taxable year 1942 (R., p. 10).

On February 23d, 1944 petitioner made a motion for the inspection of the Grand Jury Minutes, for the return of certain books and records and for the quashing of the indictment (R., p. 20).

This motion was made on affidavits on the ground that there had been an unlawful search and seizure of said books and records and on the ground that the incriminating evidence contained in said books and records was extorted from the petitioner under the guise of legal process (R., pp. 21-70).



This motion was denied, without opinion, on March 29, 1944 by a Judge of the Court of General Sessions (R., pp. 71-73).

The trial was commenced before Hon. John A. Mullen, a Judge of the Court of General Sessions and a jury on May 2d, 1944. On May 8th, 1944 the jury rendered its verdict finding the petitioner guilty on both counts of the indictment (R., pp. 373 and 374). The Court permitted petitioner's counsel to reserve his motion to set aside the verdict and for a new trial until May 25th, 1944, when sentence was to be pronounced.

Accordingly, on May 25th, 1944 petitioner's counsel moved to set aside said verdict "as contrary to the evidence and the law, and against the weight of evidence, and on all the other grounds set forth in the Code of Criminal Procedure". The motion was denied (R., p. 379a). The Court thereupon sentenced the petitioner to the penitentiary for one year on each count, the term of said sentences to run concurrently (R., 379d and 379e).

Petitioner's counsel asked the Court to grant a certificate of reasonable doubt, informing the Court that he had with him a notice of appeal which he would serve and file immediately (R., pp. 379e and 379f).

Whereupon the Court said:

"The Court: I have argued with you in court the points that you raise, in which frankly I disagree with you, but I am conscious of the fact that some of the points you raise have not been passed upon by the highest courts of this State. Under those circumstances, I do not want anybody to be in jail on my say-so until that say-so has been passed upon by the highest courts to which the defendant wishes to take it. So under the circumstances you will prepare a certificate indicating that I will stay the incarceration of this defendant until it is passed upon by the highest court, not because I think I am in error but merely because I think decency demands if a man ultimately can reverse a conviction he should not be in jail in the meantime."

The notice of appeal was filed the same day. Such appeal was from the judgment entered on the verdict of the jury, from the order denying petitioner's motion to inspect the Grand Jury Minutes, for the return of certain books and records and to quash the indictment (R., pp. 2 and 3).

On January 19th, 1945 the Appellate Division of the Supreme Court in and for the First Judicial Department, to which said appeal was taken, unanimously affirmed, without opinion, said judgment of conviction, the order denying petitioner's motion to inspect the Grand Jury Minutes, and denying petitioner's motion to return said books and records and to quash the indictment (R., p. 485).

On the same day the petitioner, having no absolute right of appeal, applied, in pursuance of subdivision 3 of Section 520 of the Code of Criminal Procedure of the State of New York, to Hon. John T. Loughran, one of the Judges of the Court of Appeals, for leave to take a further appeal to said Court of Appeals.

Due to Judge Loughran's illness the application was not decided until April 6th, 1945, when it was denied in a letter from the secretary of Judge Loughran, reading as follows:

"Judge Loughran has asked me to advise you that your application for leave to appeal in the matter of the People of the State of New York against Samuel Greenberg has been denied."

According to the practice covering such application, no order denying said motion was signed by Judge Loughran.

The petitioner has thus exhausted his right to obtain redress in the courts of the State of New York.

### **Jurisdiction**

Jurisdiction of this Court to grant certiorari to a State Court is invoked under Section 237 (b) of the Judicial Code, Title 28, Section 344 of U. S. C. A., subdivision (b).

*Chambers v. Florida*, 309 U. S. 227;

*Ashcraft v. Tennessee*, 322 U. S. 143;  
*Malinski v. People*, 89 Lawyers Edition 738.

It appears affirmatively from the Record that the books and records were illegally seized from the petitioner and searched under the guise of legal process, that is a subpoena *duces tecum* (Exhibit D opposite R., p. 46) and the incriminating evidence contained therein used against petitioner before the Grand Jury and at the trial and that a judgment of conviction could not have been obtained against the petitioner without the use of such books and records. Petitioner raised this constitutional question by his timely motion for the return of said books and records and to quash the indictment.

Petitioner also moved at the opening of the trial to dismiss the indictment, on the ground that it had been prematurely obtained, in that there had been no prior submission to the State Tax Commission of the question whether a tax was due from the petitioner upon his income for the years 1941 and 1942, and a certificate to that effect issued by such commission (R., p. 89 *et seq.*). The motion was denied (R., p. 91).

Petitioner by this motion raised the constitutional question whether there had been due process under the Fourteenth Amendment.

The petitioner thereby established the jurisdiction of this Court to review the judgment of conviction.

The writ of certiorari should be directed to the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, that being the highest court of the State of New York, in which a judgment could be had.

*Adams v. Saenger*, 303 U. S. 59, 61.

### Questions Presented

1. Whether the Appellate Division of the Supreme Court did not err in refusing to dismiss the indictment, because of the illegal search and seizure under guise of legal process, of books, records, checks and bank statements, in violation of Article 1, Section 12 of the New York State Constitution and the use of the evidence therein contained against the petitioner, whereby he was compelled to furnish incriminating evidence against himself, in violation of Article 1, Section 6 of the New York State Constitution, by virtue of which there was a failure of due process under the Fourteenth Amendment.
2. Whether the violation of the Fourth and Fifth Amendments to the Constitution of the United States, which are applicable only to the Federal Government, by the unlawful search and seizure of said books and records, thus compelling petitioner to furnish incriminating evidence against himself in the form of said books and records, did not also constitute, under the decisions in *Malinski v. People*, 89 Lawyers Ed. 738 at page 748 and *Betts v. Brady*, 316 U. S. 455, 460, 461 a violation of the Fourteenth Amendment to the Constitution, which should have resulted in a dismissal of the indictment by said Appellate Division.
3. Whether said Appellate Division did not err in refusing to dismiss said indictment, upon the ground that it had been obtained prematurely, in that there had been no prior submission to the State Tax Commission, of the question whether a tax was due from the petitioner and a determination by said Commission that such tax was due and unpaid and a certificate to that effect issued by it.

### Reasons Relied on for Allowance of the Writ

1. The writ should be granted, because of the decision of the Court of Appeals of the State of New York in *People v. Richter's Jewelers, Inc.*, 291 N. Y. 161. Such decision is in conflict with applicable decisions of this Court interpreting the language of the Fourth and Fifth Amendments to the Constitution, which language is identical with the language of said Article 1, Section 12 and Article 1, Section 6, respectively, of the New York State Constitution. The admission in evidence of such documents, in violation of the Fourth and Fifth Amendments to the Constitution, in view of the like violation of the provisions of the State Constitution, should be held to be a violation of the due process clause of the Fourteenth Amendment, under the decision of this Court, in *Betts v. Brady*, 316 U. S. 455 and *Malinski v. People*, 89 Lawyers Ed. 738, 748.

The writ should also be granted, because the State Court has decided a federal question of substance, not heretofore determined by this Court.

2. The writ should be granted, because of the importance of determining whether it is a condition precedent to a criminal prosecution for violating a State Income Tax Law, to prove that the State Tax Commission first determined, after a hearing, that a tax was due and unpaid and issued a certificate to that effect.

The reason a decision on this subject is important is that there are income tax laws in the following 23 States: Alabama, Arizona, Arkansas, California, Delaware, Georgia, Kansas, Louisiana, Massachusetts, Mississippi, Minnesota, Missouri, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin.

In most of these states, the income tax laws contain penal provisions for filing false returns.

In several of such states the almost identical language is used as in Section 376 of Tax Law of New York, hereinafter referred to, namely in Arkansas (Sub. 9 of Sec. 14053 of Pope's Arkansas Statutes of 1937, Title "Taxation and Revenue"); North Carolina (Sub. 4 of Section 105-161 of General Statutes of North Carolina 1943); North Dakota (Supplement to the Compiled Laws Sec. 2346 Sub. 7); Oregon (Vol. 7 of Compiled Laws Sections 110-1627, Sub. 6).

Such language contained in Sub. 6 of Section 376 of the Tax Law of New York, is as follows:

"The certificate of the tax commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provision of this article, shall be prima facie evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied."

We submit that under this provision no criminal prosecution for the violation of Section 376, in that a false return was filed, can be instituted, until there is a hearing and determination by the State Tax Commission that a tax is due and has not been paid and a certificate to that effect issued by said commission.

This provision shows an intention on the part of the Legislature that the State Tax Commission should be the sole body intrusted with the duty of determining whether the income tax return, which has been filed, does not correctly disclose the income upon which a tax should be paid and whether a criminal prosecution should be instituted.

This question has never been raised before, but should, we submit, be decided because the decision will affect any criminal prosecutions which may be brought for evasion of income taxes in the states above mentioned.

SAMUEL GREENBERG,  
Petitioner.

